83-1786

No. ———

IN THE

Supreme Court of the United States

October Term, 1983

Obed Aarsvold; Barry Banks; Laurence Beauchene; Ralph Bell; Melvin Bier; Warren Blesi; Eppie Booker as Trustee of the Estate of Ulysses Booker, Jr., deceased; Mary Brockman; Robert Bursch; Harold Christensen; Maureen Godar; Dorothy Haapala; Gerald Hammer; Albert Harvey; Marina Haydon; Andrew Hjelmeland; John Hogan; Ricky Johnson; Joseph Jordahl; Charles Kobow; John Knodel; Curtis Larson; LeRoy Larson; William Lovegren; Robert Mayer; Gregory McRoy; Rodney Norton; Christopher Nowicki; Burtin Olson; Randal Pederson; Michael Powell; Gary Reck; Frank Rehder; Richard Rossini; Michael Serafin; Vincent Shepard; Elizabeth Sivanich; Gregory Smith; Eugene Theisen; Michael Tomascak; Peter Tomascak; Ed Tytus; Emmal Underwood; Jeffrey Varney,

Petitioners,

vs.

Greyhound Lines, Inc.; Amalgamated Transit Union; and Amalgamated Transit Union, Division 1150,

Respondents,

BRIEF OPPOSING GRANT OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the statute of limitations controlling an employee's suit against his employer and union is tolled to a hypothetical date on which private arbitration measures would have been exhausted.

The U.S. Court of Appeals, Eighth Circuit, held in the negative, stating that this question was decided in *DelCostello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983).

2. Whether the employee's action accrues only upon a negative determination by the NLRB.

The U.S. Court of Appeals, Eighth Circuit, held in the negative.

3. Whether the holding of *DelCostello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983), should be applied retroactively.

The U.S. Court of Appeals, Eighth Circuit, held in the affirmative.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iii
Reasons For Denying Grant of the Writ	2
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Aarsvold v. Greyhound Lines, Inc., 545 F. Supp. 622 (D.Minn. 1982) 3

Aarsvold v. Greyhound Lines, Inc., 724 F.2d 73 (8th Cir. 1983), *rehearing denied* (1984) 3

Burns v. Union Pacific Railroad, 564 F.2d 80 (8th Cir. 1977) 4

Butler v. Local Union 823, I.B.T., 514 F.2d 442 (8th Cir. 1975) 6, 7

Chevron Oil v. Huson, 404 U.S. 97 (1971) 6, 8

DelCostello v. International Brotherhood of Teamsters, 103 S.Ct. 2281 (1983) 2, 3, 6, 7, 8

Edwards v. Sea-Land Service, 720 F.2d 857 (5th Cir. 1983) 7

Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983) 7, 9

Electrical Workers v. Robbins and Myers, 429 U.S. 299 (1976) 4

Folsom v. Teamsters Local Union No. 41, 576 F. Supp. 1033 (W.D.Mo. 1983) 7

Hall v. Printing & Graphic Arts Union, 696 F.2d 494 (7th Cir. 1982) 6

Hand v. International Chemical Workers Union, 712 F.2d 1350 (11th Cir. 1983) 7

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 4

Lincoln v. District 9 of International Association of Machinists, 723 F.2d 627 (8th Cir. 1983) ..5-6, 7, 8
Murray v. Branch Motor Express, 723 F.2d 1146 (4th Cir. 1983) 7
Perez v. Dana Corp. & USWA, 718 F.2d 581 (3rd Cir. 1983) 7
Price v. Southern Pacific Transportation Co., 586 F.2d 750 (9th Cir. 1978) 7
Scott v. Local 863, 725 F.2d 226 (3rd Cir. 1984) 7
Storck v. International Brotherhood of Teamsters, 712 F.2d 1194 (7th Cir. 1983) 7
Sundquist v. American Hoist & Derrick, 553 F. Supp. 924 (D.Minn. 1982) 4
United Auto Workers v. Hoosier Cardinal Corporation, 386 U.S. 696 (1966) 5
United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 3, 5, 6, 7, 8

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REASONS FOR DENYING GRANT OF THE WRIT

ISSUE 1. In his petition requesting review of the Judgment of the United States Court of Appeals, Eighth Circuit, Obed Aarsvold et al. (hereafter Aarsvold) urges that an employee should be given a period of time up "to a hypothetical arbitration date" to bring his unfair representation action against his union. This is clearly nothing more than an invitation to relitigate the decision in *DelCostello v. International Brotherhood of Teamsters,* 103 S.Ct. 2281 (1983) (6 month limitations period of Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), governs unfair representation actions). This invitation should be rejected.

For purposes of this consideration, the facts in *Aarsvold* do not place it in a category distinct from *DelCostello.* DelCostello complained to his union, brought a formal grievance under the collective bargaining agreement, and was informed by the appropriate committee that his grievance was without merit. DelCostello charged that his employer had discharged him in violation of the collective bargaining agreement, and that the union had pursued his grievance "in a discriminatory, arbitrary and perfunctory manner". 103 S.Ct. at 2286.

Aarsvold filed his grievance through Division 1150 representatives. His grievance was denied. Following Aarsvold's subsequent complaint, the members of Division 1150 voted on whether his grievance should be arbitrated. The vote was no. Aarsvold filed claims against his employer with the NLRB and later brought this complaint against the union for breach of its duty of fair representation for failure to take the grievance to arbitration.

As the Eighth Circuit correctly explained, claims for breach of the duty of fair representation "may arise when a union either refuses to process or perfunctorily processes an employee's claim against the employer." *Aarsvold v. Greyhound Lines, Inc.*, 724 F.2d 73 (8th Cir. 1983), *rehearing denied* (1984). (App. A-7). As the District Court stated, there is "no reason to draw a distinction for statute of limitations purposes between a union that arbitrarily refuses to process . . . and a union that goes through the motions of processing a grievance to the highest level...." *Aarsvold v. Greyhound Lines, Inc.*, 545 F. Supp. 622 (D. Minn. 1982) (App. A-5).

In *DelCostello* the Court noted and considered a myriad of possible limitation periods. It did not lightly reject *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), which "suffer[ed] from flaws of both legal substance and practical application." Establishing a "hypothetical arbitration date" would be a step backward from the *DelCostello* decision. Aarsvold offers absolutely no support for his assertion that such a date would be "readily determinable".

The Eighth Circuit correctly held that this question was decided by *DelCostello*. Aarsvold explicitly admits this in his Petition on page 8. Thus appellate review is unwarranted.

Moreover, only a single unfair labor practice charge for one employee, out of approximately 54 Plaintiffs, was filed with the NLRB against this local union. This one charge was later voluntarily withdrawn by the charging party. Therefore, tolling under any circumstances is inappropriate as to this Respondent.

ISSUE 2. The issue of the tolling of the statute of limitations was *not* presented to the district court herein. It was, therefore, inappropriate to raise it to the Eighth Circuit Court of Appeals, as we demonstrated to that court, and it is likewise inappropriate to raise it before this court.

Nevertheless, to address the issue, both the United States Supreme Court and the Eighth Circuit have held that the commencement of an administrative proceeding does *not* toll the statute of limitations as to a cause of action where the facts are essentially the same. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Burns v. Union Pacific Railroad*, 564 F.2d 80 (8th Cir. 1977). *See also Electrical Workers v. Robbins and Myers*, 429 U.S. 299 (1976), holding that the existence and utilization of collective bargaining procedures does not toll running of a statutory limitations period for filing a claim with the EEOC.

There is nothing which prevented Aarsvold from filing unfair labor practice charges with the NLRB and commencing his §301/fair representation claims at the same time. He could then have stayed the action on the court claim until the NLRB acted. *See Electrical Workers v. Robbins and Myers*, —— U.S. at ——, 97 S.Ct. at 448. The faliacy of Aarsvold's argument is highlighted by Judge MacLaughlin in his opinion in *Sundquist v. American Hoist & Derrick*, 553 F. Supp. 924, 930 (D. Minn. 1982):

> "The policies of labor legislation—stability and rapid settlement of disputes—would be undermined if a plaintiff could satisfy the limitations period by merely filing a charge with the N.L.R.B. and then wait years before filing a suit."

Aarsvold is, in effect, arguing for an automatic tolling of the statute of limitations in every instance that an unfair labor practice charge embodying the substance of a §301/fair representation claim is filed with the NLRB. This would lead to unprecedented consequences, including the filing of many unnecessary unfair labor practice charges just to toll the statute.

There is no reason on the merits to toll the statute of limitations here. The underlying legal issue in the NLRB proceeding was identical to that which underlies Aarsvold's lawsuit. The legal issue was whether the collective bargaining agreement was in effect on December 5, 1980, when Aarsvold and the other plaintiffs went out on strike. If it was, the strike was in breach of the no-strike clause in the agreement, and the discharges were appropriate.

Tolling a statute of limitations for a long period of time puts a premium on delay on the part of potential plaintiffs, during which time records may be lost, union officers may change, witnesses die or become unavailable and memories fade. There is no accurate way to predict how long an NLRB investigation and decision might take. Because an employee may fail before the NLRB, but prevail in his court suit, the employee is not denied due process. The employee is actually benefited by the opportunity for a dual claim.

The reasons underlying the federal policy of rapid labor dispute resolution dictate that an employee should consider and be prepared in each instance to meet the relevant time limitations. *See Mitchell, supra; United Auto Workers v. Hoosier Cardinal Corporation,* 386 U.S. 696 (1966); *Lincoln v. District 9, International Association of Machinists and Aerospace Workers,* 723 F.2d 627 (8th

Cir. 1983). *See also Hall v. Printing & Graphic Arts Union,* 696 F.2d 494 (7th Cir. 1982) (increased risks of reinstatement and payment of back pay to discharged employees result from long statutes of limitation).

Aarsvold admits he and the others filed with the NLRB "upon being informed by their union that their discharges would not be brought to arbitration." (Petition-9). As the Court of Appeals held, this date, March 13, 1981, was the date the period of limitations began to run. (App. A-3). *Accord, Butler v. Local Union 823, I.B.T.,* 514 F.2d 442 (8th Cir. 1975) (action against union accrues when union engages in acts of alleged unfair representation).

ISSUE 3. In determining whether *DelCostello* should be applied retroactively, the 8th Circuit held:

(1) There was no clear break from the prior law, and the employee was on notice of a potentially shorter period because of *Mitchell;*

(2) Retroactive application of *DelCostello* would further the policy of prompt settlement, particularly since the employee waited over six months after the *Mitchell* case was decided to file his suit; and

(3) Because there was no clear break from prior law, and because the employee was on notice, the result would not be unjust or inequitable.

See Lincoln v. District 9 of International Association of Machinists, 723 F.2d 627 (8th Cir. 1983), *applying Chevron v. Huson Oil,* 404 U.S. 97 (1971).

The issue of whether *DelCostello* is to be applied retroactively has been ruled upon by six Circuit Courts in

addition to the 8th Circuit's ruling in *Lincoln*. Three of those decisions, by the Third, Seventh and Eleventh Circuits, are cited in *Lincoln: Hand v. International Chemical Workers Union*, 712 F.2d 1350 (11th Cir. 1983) (per curiam); *Perez v. Dana Corp. & USWA*, 718 F.2d 581 (3rd Cir. 1983); *Storck v. International Brotherhood of Teamsters*, 712 F.2d 1194 (7th Cir. 1983). Since *Lincoln*, two other Circuits have reached the same conclusion. They are *Murray v. Branch Motor Express*, 723 F.2d 1146 (4th Cir. 1983) and *Edwards v. Sea-Land Service*, 720 F.2d 857 (5th Cir. 1983). The only Circuit Court decision to the contrary is the 9th Circuit's decision in *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 (9th Cir. 1983). The differences between the 9th Circuit's decision in *Edwards* and those by the other circuits may be explained by the pre-*DelCostello* rules in the circuits as to statutes of limitations. It appears that the 9th Circuit had adopted what might be termed a hard and fast three year limitations period. *See Price v. Southern Pacific Transportation Co.*, 586 F.2d 750, 753 (9th Cir. 1978). The 9th Circuit rule differed from that of the 8th Circuit, which maintained flexibility by "characterizing" the cases. *See Butler v. International Brotherhood of Teamsters Local 823*, 514 F.2d at 448 (contract limitation period of five years does *not* have application to *all* fair representation suits).

Aarsvold then was on notice by virtue of *Butler, supra*, that he and the others could *not* rely on the state's limitations period governing contracts. *See Folsom v. Teamsters Local Union No. 41*, 576 F. Supp. 1033 (W.D.Mo. 1983) (employees in 8th Circuit were on notice after *Mitchell* that they could *not* rely on previous statute of limitations); *Scott v. Local 863*, 725 F.2d 226, 228 n.1 (3rd Cir.

1984) *(Mitchell* did foreshadow *DelCostello).* Thus, *DelCostello* was *not* a clear break from prior law.

The action by Aarsvold was commenced on November 24, 1981, close to one year after his discharge; more than eight months after the union membership voted not to arbitrate his grievance; and seven months after *Mitchell* was decided. Therefore, under *Lincoln* and the *Chevron* criteria, Aarsvold had time to digest *Mitchell after Mitchell* with its 90 day limitations period was decided and still bring a timely court action. But Aarsvold and the other plaintiffs did not.

Separate and apart from its determination that the three pronged test in *Chevron Oil* was satisfied, the 8th Circuit, in *Lincoln,* made the following important and separate determination:

> "We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." (Citing U.S. Supreme Court decisions)

CONCLUSION

One of the principal values of the *DelCostello* decision is that it restores certainty to the law, so that all parties know that there is a fixed time period within which they have to commence their §301/fair representation actions, regardless of what the state statute of limitations may be, and regardless of whether unfair labor practice proceedings have or have not been commenced. The Circuit Courts are almost unanimous in applying *DelCostello* retroactively. The unique circumstances within the 9th Circuit result-

ing in the *Edwards* decision do not create a substantial federal question justifying the granting of the Writ of Certiorari.

For all of the above reasons, it is respectfully submitted that the Petition herein be denied.

Dated: May 18, 1984.

Respectfully Submitted,

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